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Attorney for Objectors
Margaret Munoz and Cery Perle

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

VIVIAN FIORI ARIZA, ROGGIE TRUJILLO,
PAMELA NEWPORT, ROBERT DEAN, and
RAUL REYES

Plaintiffs,

v.

DELL INC., a corporation; BANCTEC, INC., a
corporation; WORLDWIDE TECHSERVICES,
LLC, f/k/a QUALXSERV, LLC, an entity; DELL
CATALOG SALES, L.P., an entity; DELL
PRODUCTS, L.P., an entity; DELL
MARKETING L.P., an entity; DELL
MARKETING L.P., an entity; DEL USA, L.P., an
entity; and DOES 1 through 10,

Defendants.

Case No. 09-CV-01518-JW

**OBJECTION OF MARGARET MUNOZ
AND CERY PERLE TO PROPOSED
SETTLEMENT AND NOTICE OF INTENT
TO APPEAR**

Date: March 21, 2011
Time: 9:00 a.m.
Place: CourtRoom 8
Judge: Honorable James Ware

COME NOW, MARGARET MUNOZ and CERY PERLE ("Objectors") unnamed Class Members to this action, by and through their undersigned counsel, who hereby object to Class Counsel's Memorandum Of Points And Authorities in Support of Its Application For An Award Of Attorneys' Fees, Costs, And Incentive Awards; dated February 1, 2011 (Docket # 181)(hereinafter, "Motion for Fees") and Plaintiffs' Memorandum Of Points And Authorities In Support Of Motion For Final Approval Of Class Action Settlement dated February 8, 2011 (Docket # 193)(hereinafter, "Motion for Settlement") in this matter and hereby notify this Court of its intention to appear by and through the undersigned, to present argument in this matter at the Fairness Hearing currently set for March 21, 2011.

Objectors, MARGARET MUNOZ and CERY PERLE, represent to the court that they are Class Members, qualified to make claims as set forth in the NOTICE OF CLASS ACTION SETTLEMENT; Ms. Munoz resides in San Diego County, State of California and Mr. Perle resides in Los Angeles County, State of California; but all mail should be sent to their attorney's address above.

The Motion for Fees and Motion for Settlement should not be approved for the reasons more fully delineated below.

I. COURT MUST CRITICALLY ANALYZE THE FEE APPORTIONMENT AS FIDUCIARY OF THE CLASS.

The court has a "duty under Rule 23 of the Federal Rules of Civil Procedure to protect absent class members and to police class action proceedings." *Strong v. BellSouth Telecommunications, Inc.*, 137 F.3d 844, 849 (5th Cir. 1998). The duty requires a review of substantive claims included in the agreement and an investigation into the manner in which fees of class counsel are to be paid and the dollar amount for such services. *Id.* "Active judicial involvement in measuring fee awards is singularly important to the proper operation of the class-action process. Continued reliance on case law development of fee-award measures does not diminish the court's responsibility. In a class action, the

1 district court must ensure that the amount and mode of payment of attorney fees are fair and proper
 2 whether the fees come from a common fund or are otherwise paid. Even in the absence of objections, the
 3 court bears this responsibility.” Committee Notes to Rule 23(h), 2003.

4
 5 Once a settlement is reached, both Class and Defendant's counsel's interests change. No longer
 6 vigorously advocating for their clients' interests, Class Counsel's interests are inherently conflicted with
 7 the Class, as they become another claimant to the very fund that they have created for their clients. Thus,
 8 the Court necessarily becomes the fiduciary for the fund's beneficiaries and must carefully monitor
 9 disbursement to the attorneys by scrutinizing fee applications. *Skelton v. General Motors Corp.*, 860
 10 F.2d 250, 253 (7th Cir. 1988), cert denied, 493 US 810, 110 S. Ct. 53, 107 L. Ed. 2d 22 (1989.)

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 12 **II. THE NINTH CIRCUIT SUPPORTS A LODESTAR “CROSS-CHECK” REGARDLESS**
 13 **OF THE METHOD OF CALCULATION USED TO DETERMINE ATTORNEYS’ FEES.**

14 The District Court has discretion to use either the lodestar method or the percentage of the fund
 15 method for calculating attorney fees in common fund cases. *In re Washington Public Power Supply*
 16 *System Securities Litigation*, 19 F.3d 1291, (9th Cir. 1994.) Whichever method the District Court
 17 employs, the Ninth Circuit has opined that “we require only that fee awards in common fund cases be
 18 reasonable under the circumstances.” *Florida v. Dunne*, 915 F.2d 542, 545 (9th Cir.1990). “Because a
 19 reasonable fee award is the hallmark of common fund cases, and because arbitrary, and thus
 20 unreasonable, fee awards are to be avoided, neither method should be applied in a formulaic or
 21 mechanical fashion.” *In re Washington Public Power Supply System Securities Litigation*, 19 F.3d
 22 1291, 1295 (9th Cir. 1994.)

23
 24 Although the Ninth Circuit permits use of either method, the one constant in this calculation is
 25 reasonableness. The Ninth Circuit opined “we require only that fee awards in common fund cases be
 26 reasonable under the circumstances.” *Florida v. Dunne*, 915 F.2d 542, 545 (9th Cir.1990). “Because a
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reasonable fee award is the hallmark of common fund cases, and because arbitrary, and thus unreasonable, fee awards are to be avoided, neither method should be applied in a formulaic or mechanical fashion.” *In re Washington Public Power Supply System Securities Litigation*, 19 F.3d 1291, 1295 (9th Cir. 1994.) “Calculation of the lodestar, which measures the lawyers' investment of time in the litigation, provides a check on the reasonableness of the percentage award...the lodestar may provide a useful perspective on the reasonableness of a given percentage award.” *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 (9th Cir. 2002.)

A. Lead Counsel is Required to Submit Detailed Billing Records to Demonstrate the Reasonableness of Its Request for Fees and Costs.

Lead Counsel bears the burden of demonstrating entitlement to their fees and the reasonableness of the request through detailed documentation of its efforts. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983.) In the instant matter, Lead Counsel has provided the Court with only a bare bones summary of the total value of fees and expenses incurred in this case. (See Declaration of Brian R. Strange, Exhibits 2, 3, and 4.)

Courts, therefore, must inquire into the nature and source of the attorneys' fees requested by Class Counsel in order to ascertain their reasonableness. The Committee Notes to Rule 23(h) in 2003 state, “courts may take account of the fees charged by class counsel or other attorneys for representing individual claimants or objectors in the case. In determining a fee for class counsel, the court's objective is to ensure an overall fee that is fair for counsel and equitable within the class.” 2003 Committee Notes, Rule 23.

Thus, the Court must necessarily inquire into the billing records of Class Counsel to determine their reasonableness. *Hensley*, at 437. While summaries of these records can be used in certain circumstances, the underlying material must be made available. Fed. R. Evid. 1006.

1 The Supreme Court, in *Hensley* opined that, "the fee applicant bears the burden of establishing
 2 entitlement to an award and documenting the appropriate hours expended and hourly rates." *Hensley*, at
 3 436. (In Footnote 12, the *Hensley* Court further stated it would not "view with sympathy" a fee
 4 applicant's claim that the District Court had abused its discretion by awarding unreasonably low
 5 attorney's fees if counsel's records do not provide support for the request. *Id.*)

7 Likewise, the Ninth Circuit has concurred that, "[c]ounsel may not submit 'mere summaries of
 8 hours worked in calculation of the Lodestar.'" *Intel Corp. v. Terabyte Intern., Inc.*, 6 F.3d 614 (9th Cir.
 9 1993); citing *Entertainment Research Group, Inc. v. Genesis Creative Group, Inc.*, 122 F.3d 122, 1231
 10 (9th Cir. 1997)). So, since the Ninth Circuit relies on a lodestar cross check to ensure reasonableness
 11 when awarding fees to Class Counsel, this Court necessarily must inquire into Class Counsel's billing
 12 records.
 13

14 **B. Class Counsel Has Provided No Detailed Billing Records for Its Lodestar Calculation.**

15 The Ninth Circuit recently had opportunity to decide whether and how much information a Class
 16 Member is entitled to in advance of the objection deadline. The Court opined, "[a]llowing class
 17 members an opportunity thoroughly to examine counsel's fee motion, inquire into the bases for various
 18 charges and ensure that they are adequately documented and supported is essential for the protection of
 19 the rights of class members. It also ensures that the district court, acting as a fiduciary for the class, is
 20 presented with adequate, and adequately-tested, information to evaluate the reasonableness of a
 21 proposed fee.." *Mercury Interactive Corp. Securities Litig.*, 618 F.3d 988, 994 (9th Cir. 2010). **Thus,**
 22 **this Circuit requires that disclosure of the bases for the requested attorneys' fee in the Motion for**
 23 **Fees is absolutely mandatory.** The *Mercury* court further concluded that this "practice borders on a
 24 denial of due process because it deprives objecting class members of a full and fair opportunity to
 25 contest class counsel's fee motion." *Id* at 993.
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1 In this case, Class Counsel is requesting a fee of \$ 5,368,000 in its Motion for Fees. (Doc. 181.)
 2 However, the Motion submitted provides little additional factual basis to support this request to inform
 3 this Objector whether or not the fee request is a fair one. The Motion provides only a summary, in chart
 4 form, of the total hours expended by each attorney in this litigation. (See Dec. Strange, Ex. 2, 3, 4.)
 5 This places Objectors in the peculiar and anomalous position of being required to merely trust that the
 6 attorneys representing their Class have provided accurate totals and that their work was neither
 7 duplicative nor wasteful. Objectors believe that the procedure being followed in this case violates
 8 F.R.C.P. 23 (h) because the Class does not have actual notice of the details underlying such request prior
 9 to the Objection deadline. Objectors and the Court need to examine the time reports submitted by Class
 10 Counsel in order to properly analyze the instant Fee Request. The Class is entitled to know how their
 11 attorneys spent their time in vigorously advocating their interests.
 12

13 Thus, the Court should, and must, investigate not only the total amount of time expended, but by
 14 whom it was expended. Was it by a partner, an associate or a contract attorney, and were the rates
 15 charged reasonable? Did one person take or defend a deposition, or were many associates in attendance?
 16 All of these matters should be investigated to make sure that the Class is not being overcharged.
 17 Because none of these important details are provided to the Class or the Court, notice of the fee motion
 18 has not been directed to class members in a “reasonable manner” as required by Fed. R. Civ. P. 23
 19 (h)(1).
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22 **III. THE FEE ARRANGEMENT BREACHES THE DUTY TO THE CLASS**

23 In its Motion for Fees, Class Counsel informs the Class that any attorneys’ fees will not be paid
 24 out of the settlement fund. As a result, if the court reduces the fee request the money will revert back to
 25 the defendant rather than make its way into the hands of the Class. Framing the attorneys’ fee provision
 26 in this manner only serves to decrease Class Members’ incentive to object to the requested fee and to
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1 evade the necessary scrutiny of this court. Thus, this structure may have the improper result of
2 improperly inflating Class Counsels' fee award.

3 The truth is that "a defendant is interested only in disposing of the total claim asserted against it;
4 ... the allocation between the class payment and the attorneys' fees is of little or no interest to the
5 defense." *In re General Motors Corp. Pickup Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 819-20
6 (3rd Cir. 1995)(*see also Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43,52 (2d Cir. 2000)(
7 "Defendants, once the settlement amount has been agreed to, have little interest in how it is distributed
8 and thus no incentive to oppose the fee.") Therefore, "private agreements to structure artificially
9 separate fee and settlement arrangements cannot transform what is in economic reality a common fund
10 situation." *General Motors* at 821.

13 As stated above, the primary danger in separating the fee awarded from the common fund is that
14 the incentive, by both Objectors and the Court, to scrutinize the fee application is significantly
15 diminished. In so doing, Class Counsel places their own financial interest above that of the class in that
16 any portion of the fee request this Court finds to be excessive will revert back to the Defendants rather
17 than to the Class Members. Or, should the Court awards the fee request in its entirety, this may result in
18 an inflated award of attorneys' fees. Either way, structuring the fees in this manner side step the
19 safeguards of Rule 23 in that it minimizes scrutiny into its application.

21 Additionally, part of the Court's determination of reasonableness of fees includes a review of the
22 result obtained on behalf of the Class. *Vizcainzo v. Microsoft Corp.*, 290, F. 3d 1043 (9th Cir. 2002.)
23 However, separating Class Counsels' attorneys' fee request from the fund itself removes this portion of
24 the analysis. Whether the number of claimants to this common fund is two Class Members or the
25 purported 4.7 million Class Members (See Motion for Settlement, p. 10, lns. 19, 25-6), Class Counsel's
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award remains firmly fixed at approximately \$5 million dollars (if the Court grants the instant fee request in its entirety).

Thus, Class Counsel has brokered a deal that puts their financial interests above those of the Class Members. This fact alone renders this settlement unfair, inadequate, and unreasonable under Rule 23(e)(2).

IV. THE COURT MAY NOT RELY ON THE OPINION OF THE MEDIATOR IN ITS CALCULATION OF FEES AND DETERMINATION OF FAIRNESS

Class Counsel states, in support of its fee application, that “both mediators have filed declarations in support of the settlement and attorneys’ fee award in this case, and both testify as to the arms-length nature of the negotiations for the settlement and attorneys’ fees.” (Motion for Fees, p. 6, lns. 23-25.) (See Also Declaration of Panelli, Doc. 191 and Declaration of Piazza, Doc. 182.) The Mediators’ opinions regarding settlement and Class Counsels’ request for fees and costs is wholly improper and should be struck or at least ignored in its entirety. These opinions were clearly formed as a result of the mediators’ involvement in mediation. As such, the opinions are clearly inadmissible under Federal Rules of Evidence, Rule 408(a).

To inject the Mediators into the judicial examination and approval process taints the process with a biased opinion regarding fairness or reasonableness, by someone who is supposed to be, by definition, a neutral. This Objector further objects to the Declarations of the Mediators Piazza and Panelli to the extent that they are hearsay evidence under Federal Rules of Evidence 801, 802. As such, these opinions regarding the reasonableness of the fee request must be disregarded or, in the alternative, the mediators should be produced at the final approval hearing for examination by the court, parties, and objectors.

1 **V. OBJECTORS' ADDED VALUE TO THE CLASS.**

2 In their zeal to win approval of an agreement, professional class counsel and professional
3 defense counsel often overlook or deny the importance of objectors to the class-action process. Indeed,
4 professional class counsel and professional defense counsel may even denounce objectors' counsel as
5 "serial objectors," or use some other pejorative epithet. However, settlements, such as this one, can be
6 so complicated that only lawyers who have participated in many class action lawsuits can provide
7 insightful and useful analysis, thoughtful alternatives, and a context within which to identify flaws or
8 oversights in a settlement, and thereby assist a court in fulfilling its duty to examine the settlement as an
9 independent and impartial neutral.
10

11 Thus, objectors provide great value to the class action process. Without resolving the issues
12 described above, the Settlement could become a complete sham and no one would be the wiser. The
13 judicial system would have failed Class Members by requiring no mechanism for assuring that the
14 persons who should benefit receive the agreed relief. The foregoing observations are submitted to
15 improve the Settlement, and thereafter to guarantee it will work, and to show when and how well it is
16 completed. These improvements are developed only now because objectors offer the last opportunity to
17 preserve the adversary process which is necessary to test the fairness of a proposed settlement.
18

19 "It is desirable to have as broad a range of participants in the fairness hearing as possible because
20 of the risk of collusion over attorneys' fees and the terms of settlement generally. . . . It is impossible for
21 a class to select, retain or monitor its lawyers as an individual client would." *Great Neck Capital*
22 *Appreciation Inv. P'ship, L.P. v. PricewaterhouseCoopers, L.L.P.*, 212 F.R.D. 400, 412 (E.D. Wis.
23 2002). "Class counsel and defendants' counsel may reach a point where they are cooperating in an effort
24 to consummate the settlement." *Id.* "Courts, too, are often inclined toward favoring the settlement, and
25 the general atmosphere may become largely cooperative." *Id.*
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1 "Thus, objectors serve as a highly useful vehicle for class members, for the court and for the
 2 public generally." *Great Neck*, 212 F.R.D. at 412. "From conflicting points of view come clearer
 3 thinking." *Id.* at 412-13. "Therefore, a lawyer for an objector who raises pertinent questions about the
 4 terms or effects, intended or unintended, of a proposed settlement renders an important service." *Id.* at
 5 413.
 6

7 In other cases, objectors' counsel have been recognized where their efforts have augmented the
 8 common fund or otherwise improved a class action settlement. See, e.g., *Bowling v. Pfizer, Inc.*, 922
 9 F.Supp. 1261, 1285 (S.D. Ohio), aff'd, 102 F.3d 777 (6th Cir. 1996); *In re Domestic Air Transp.*
 10 *Antitrust Litig.*, 148 F.R.D. 257, 359-60 (N.D.Ga. 1993). Indeed, even in cases where objectors
 11 appeared but the settlement terms were not altered, courts have recognized their value in that their
 12 presence improved the process and assisted the court in its scrutiny of the settlement. *See County of*
 13 *Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1325-27 (2d Cir. 1990); *Howes v. Atkins*, 668
 14 F.Supp. 1021, 1027 (E.D.Ky. 1987); *Frankenstein v. McCrory Corp.*, 425 F.Supp. 762, 767 (S.D.N.Y.
 15 1977); *see also Domestic Air*, 148 F.R.D. at 359. Likewise, the Committee Notes to Rule 23(h)
 16 expressly states the benefit that objectors may bring to a case:
 17

18 "In some situations, there may be a basis for making an award to other counsel whose
 19 work produced a beneficial result for the class, such as attorneys who acted for the class
 20 before certification but were not appointed class counsel, or attorneys who represented
 21 objectors to a proposed settlement under Rule 23(e) or to the fee motion of class counsel.
 22 Other situations in which fee awards are authorized by law or by agreement of the parties
 23 may exist."
 24 2003 Committee Note, Rule 23(h).

25 **A. Request for Attorneys' Fees.**

26 Based on the foregoing, these Objectors wish to reserve the right to apply for reasonable and
 27 appropriate compensation for the valuable and crucially important services which have been provided in
 28 assisting the Court with this complex matter, preserving the adversary process needed to test the

1 Proposed Settlement, identifying problems with the Proposed Settlement, and presenting substantial and
2 workable solutions.

3 Just as objectors' counsel should be encouraged to assist the class-action process, so should
4 individual class members be encouraged to participate. Accordingly, an incentive award is appropriate
5 for Objectors herein for its willingness to be a named party, promoting fairness, and contributing to the
6 common welfare of the Class.
7

8 **VI. JOINDER IN OTHER OBJECTIONS**

9 This Objector adopts and joins in all other well taken - bona fide objections filed by other Class
10 Members in this case, and incorporates them by reference as if they appeared in full herein.
11

12 **VII. CONCLUSION**

13 Based on the foregoing arguments and any additional arguments presented at the hearing, these
14 Objectors respectfully request the following:

15 A. Upon proper hearing, sustain these Objections;

16 B. Upon proper hearing, enter such Orders as are necessary and just to adjudicate these
17 Objections and to alleviate the inherent unfairness, inadequacies and unreasonableness of the proposed
18 settlement;
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20 C. Continue the Fairness Hearing until such time that these Objectors and the Class have had
21 the opportunity to review Class Counsels' detailed billing records; AND
22

23 D. Award an incentive fee to these Objectors for their service as representative of unnamed
24 Class Members in this litigation.

25 Dated: February 22, 2011

26 By: /s/ Darrell Palmer
DARRELL PALMER

27 Attorney for Objectors Margaret Munoz and Cery Perle
28

CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2011, I electronically filed the foregoing OBJECTION OF MARGARET MUNOZ AND CERY PERLE TO PROPOSED SETTLEMENT AND NOTICE OF INTENT TO APPEAR with the Clerk of the Court of the United States District Court for the Northern District of California by using the USDC CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the USDC CM/ECF system, to wit:

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